

RESEARCH ARTICLE

# Relational legal pluralism and Indigenous legal orders in Canada

Kelty McKerracher 

Faculty of Law, University of Victoria, PO Box 1700, STN CSC, Victoria, British Columbia, Canada V8W 2Y2  
Email: [keltycmckerracher@uvic.ca](mailto:keltycmckerracher@uvic.ca)

## Abstract

The survival and resurgence of Indigenous legal orders and constitutional traditions in Canada, as elsewhere, disrupt the normative hegemony of the liberal state and articulate a constitutionalism that accounts for a plurality of laws. How can state and non-state legal orders interact across vastly different normative worlds? How can their interaction address the colonial power imbalance and what role should recognition play in this relationship? This article draws on the work of Ralf Michaels on relational legal pluralism and Aaron Mills on Anishinaabe constitutionalism to explore how a legally plural society must embrace Michaels' challenge of constitutive external recognition: the idea that legal orders mutually constitute each other through recognition without interfering with each other's factual status as law. External recognition is consistent with strong legal pluralism and is distinct from recognition within the multicultural liberal state, a form of weak legal pluralism and continued colonialism. Mills' discussion of treaty, rather than contract, as a foundation for shared political community assists in imagining a constitutionalism with/in Canada in which distinct legal orders can mutually constitute each other without domination. Linkage norms may help to establish reciprocal relations among state law and Indigenous legal orders, and the enactment of such 'tertiary rules of recognition' from within Indigenous legal orders may itself shift the balance of power.

**Keywords:** constitutionalism; external recognition; Indigenous legal orders; legal pluralism; liberalism

## I. Introduction

I see you; you see me; this is reciprocal; this reciprocity signals justice.

– Audra Simpson<sup>1</sup>

Canadian-Indigenous legal and constitutional relations are at a particularly unique historical moment. The Supreme Court of Canada's 2014 declaration of Aboriginal title

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<sup>1</sup>A Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press, Durham, NC, 2014) 23.

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in *Tsilhqot'in* actualized a standard of consent in Canadian law, clarified that title is a limit on both provincial and federal jurisdictions<sup>2</sup> and implicated a sphere of Indigenous jurisdiction and law internal to the title area.<sup>3</sup> Indigenous peoples are rearticulating their legal orders and governance structures in myriad forms, asserting these in ways cognizable to Canadian law<sup>4</sup> while, as ever, contesting colonial legal forms with distinctive normative worlds. In 2018, the first cohort of the JD/JID Joint Degree Program in Canadian Common Law and Indigenous Legal Orders commenced at the University of Victoria, the first of its kind. This programme will soon see up to 25 graduates annually with legal training that takes Indigenous multi-juralism as its premise and employs a trans-systemic method to envision, as Val Napoleon articulates, symmetrical legal relations between state and non-state law.<sup>5</sup> The survival and resurgence of Indigenous legal orders and constitutional traditions in Canada, as elsewhere in the world, disrupt the normative hegemony of the liberal state and articulate a constitutionalism that accounts for a plurality of laws.

The 2015 Truth and Reconciliation Commission of Canada Calls to Action called upon the Government of Canada to adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>6</sup> and to reconcile Aboriginal and Crown constitutional and legal orders, including the recognition and integration of Indigenous laws and legal traditions.<sup>7</sup> In November 2019, after years of advocacy by Indigenous peoples, the legislature of the province of British Columbia (BC) passed the *Declaration on the Rights of Indigenous Peoples Act*.<sup>8</sup> Federal UNDRIP Bill C-15 followed, becoming law in June 2021.<sup>9</sup> One of the hopes for these measures is that the adoption of international human rights standards and harmonization of Canada's laws with them will help to fulfill the as yet unmet promise of section 35(1) of the *Constitution Act, 1982*<sup>10</sup> – the promise of constitutional partnership and self-determination.

Indigenous peoples have always been strong participants in Canada's constitutional tradition, through Indigenous diplomacies pre-dating the arrival of Europeans, treaties, the enactment of section 35 and the continuity of Indigenous constitutionalism, law and legal authority up to the present day.<sup>11</sup> Anishinaabe constitutional scholar Aaron Mills reminds us that we, Indigenous and non-Indigenous peoples in what many today call

<sup>2</sup>*Tsilhqot'in Nation v British Columbia* (2014) SCC 44, para 141, [2014] 2 SCR 257.

<sup>3</sup>B Slattery, 'The Metamorphosis of Aboriginal Title' (2006) 85 *Canadian Bar Review* 255, 270.

<sup>4</sup>*R v Van der Peet* [1996] 2 SCR 507, para 49, 137 DLR (4<sup>th</sup>) 289.

<sup>5</sup>See V Napoleon & H Friedland, 'An Inside Job: Engaging with Indigenous Legal Traditions Through Stories' (2016) 61(4) *McGill Law Journal* 725.

<sup>6</sup>UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples (October 2007), <[https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)>.

<sup>7</sup>Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, 2015), Calls to Action 45(ii)(iv), <[http://trc.ca/assets/pdf/Calls\\_to\\_Action\\_English2.pdf](http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf)>.

<sup>8</sup>*Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 (DRIPA).

<sup>9</sup>*United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. Bill C-15 was modelled after Private Member's Bill C-262, which died on the Order Paper in June 2019 when it was blocked in the Senate.

<sup>10</sup>*Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), c 11. The text of section 35 (1) reads: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'

<sup>11</sup>J Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press, Toronto, 2016) 109.

Canada, are inextricably tied, mutually constituted by relationships between our unique and interdependent political communities.<sup>12</sup> Indigenous peoples embody this understanding in their unique exercises of law and jurisdiction alongside provincial and federal jurisdictions, often demonstrating principles of cooperative federalism in areas such as environmental protection and disaster response, and, most recently, COVID-19 response.<sup>13</sup> While cooperative federalism is a fixture of Canadian constitutional life,<sup>14</sup> to date Canadian federalism has excluded Indigenous peoples and denied their laws and lifeways. The persistent denial of Indigenous peoples' legal worlds and jurisdictions has led to conflicts across the country as Indigenous peoples assert and uphold their legal obligations to their territories. These are manifestations of contested legality and governance in a context of land dispossession and genocide by the state, and the absence of reciprocal legal relations between Canadian and Indigenous polities.

Constitutionalism and federalism among distinct peoples necessarily must embrace the fact of legal pluralism. Napoleon observes that since legal pluralism has always existed between Indigenous societies across Turtle Island and is now a part of Canada, what is imagined in the name of reconciliation must include legal orders – Indigenous and Canadian – as a starting point.<sup>15</sup> As many have observed, thinking about legal pluralism is not new to Canada's constitutional order: Quebec's unique place in the federation is reflected in the coexistence of civil law and common law, and since the 1990s, McGill University Faculty of Law has employed the trans-systemic method for analysing the relationship between them.<sup>16</sup> Yet these two legal traditions are both Euro-colonial newcomers; moreover, they are both state-based – that is, based on a centralized political and administrative structure. In contrast, although Indigenous legal orders are themselves plural and diverse, they tend to be decentralized, discursive and relational, with obligations refracted throughout kinship systems.<sup>17</sup> How can Indigenous and non-Indigenous legal orders in Canada interact across vastly different normative worlds? Moreover, how can their interaction deal with the reality of colonialism and asymmetrical legal relations?

In this article, I aim to make a small contribution to the discourse on legal pluralism by focusing on the work of two scholars whose work takes a relational approach to its problems and promises: Ralf Michaels on relational legal pluralism<sup>18</sup> and Aaron Mills

<sup>12</sup>A Mills/Waabishki Ma'iingan, 'What is a Treaty? On Contract and Mutual Aid' in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 208–47.

<sup>13</sup>See Heiltsuk Tribal Council, 'Dáduqvǵá qntxv Ġvilásax, to Look at Our Traditional Laws: Decision of the Heiltsuk (Haifzaqv) Dáduqvǵá Committee Regarding the October 13, 2016 Nathan E. Stewart Spill' (2018), <[http://www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk\\_Adjudication\\_Report.pdf](http://www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf)>; see also Council of the Haida Nation, 'New BC Order Better Aligns with Haida Law and Haida Gwaii's COVID-19 Response' (July 2020), <[https://www.haidanation.ca/?nooz\\_release=new-bc-order-better-aligns-with-haida-law-and-haida-gwaiis-covid-19-response-july-30-2020](https://www.haidanation.ca/?nooz_release=new-bc-order-better-aligns-with-haida-law-and-haida-gwaiis-covid-19-response-july-30-2020)>.

<sup>14</sup>J Webber, *The Constitution of Canada: A Contextual Analysis* (Hart, Oxford, 2015) 169.

<sup>15</sup>V Napoleon, 'Legal Pluralism and Reconciliation' (2019) *November Maori Law Review* 2, 5.

<sup>16</sup>J Webber et al, 'Sally Engle Merry, Legal Pluralism, and the Radicalization of Comparative Law' (2020) 54(4) *Law and Society Review* 846, 847.

<sup>17</sup>V Napoleon, 'Living Together: Gitksan Legal Reasoning as a Foundation for Consent' in J Webber and CM Macleod (eds) *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press, Vancouver, 2010).

<sup>18</sup>R Michaels, 'Law and Recognition: Towards a Relational Concept of Law' in N Roughan and A Halpin (eds) *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press, Cambridge, 2017) 90–115.

on Anishinaabe constitutionalism and treaty.<sup>19</sup> Specifically, I will explore how an effective multi-juridical, legally plural society will need to embrace Michaels' challenge of constitutive external recognition – the idea that legal orders mutually constitute each other through recognition without interfering in each other's factual status as law.

The discussion begins with an overview of pluralism and continues with the distinction between 'strong' and 'weak' legal pluralism, the role that recognition plays in each and how these forms of pluralism manifest in Canada's current legal and political landscape with respect to Indigenous law. The British Columbia Utilities Commission's recent Indigenous Utilities Regulation Inquiry serves as a case study of these dynamics, as one of the first proceedings by an administrative tribunal in Canada to openly attempt to implement UNDRIP standards, and as an example of a quasi-judicial structure premised on an assumption of singular legal authority grappling with the realities of plural Indigenous legal authorities.

The article proceeds by tackling the problem of power posed by Michaels, Napoleon and others, in that the imagined formal equality of state and non-state legal orders is not sufficient for effective legal pluralism in a context of ongoing settler colonialism. I aim to critique how the dominant Western ideologies of state-based liberalism and market-based neoliberalism shape conceptions of legal pluralism, as both ideologies are founded on the notion of contract and involve assimilation and accommodation of diverse normative orders by the most hegemonic. One response to this problem is to approach legal pluralism from the perspective of treaty and mutual aid, as does Mills. Mills' suggestion of treaty, rather than contract, as a foundation for shared political community assists in imagining a constitutional framework in Canada in which distinct legal orders can mutually constitute each other without one dominating the other. I conclude by considering the importance of linkage rules, or norms, that can establish mutually constitutive external recognition among state law and Indigenous legal orders, and look at how the process of enacting such rules of recognition may itself shift the balance of power.

While Mills and Michaels write from quite different philosophical frameworks, my reasons for choosing their work to frame my arguments are based more on what they share than how they differ. Both deal specifically with relations among state and non-state law in colonial contexts, bringing an analysis of power into their propositions about pluralism. Both grapple with the shortcomings of liberalism as an organizing ideology for thinking about, and doing, difference – Mills, in particular, unpacks the violence to Indigenous peoples and their normative orders resulting from the social contract, and troubles the idea of a single, universalizing umbrella of normativity under which all diversity must fit. Both emphasize that distinct legal and constitutional orders necessarily exist in relation to each other – while Michaels writes toward a theory of laws that takes legal pluralism as the starting place rather than an afterthought, Mills applies Anishinaabe constitutionalism to intersocietal political community among Indigenous and non-Indigenous peoples on Turtle Island. Importantly, both scholars avoid reducing these relationships to purely operational or jurisdictional matters, focusing instead on what Michaels calls the prior situation of mutual recognition – quite different, as I'll explore, from recognition within the liberal state.

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<sup>19</sup>See (n 12).

## II. External recognition as an element of law(s)

Indigenous law is *law*.<sup>20</sup> Indigenous peoples have maintained and adapted legal procedures and kinship-based governance structures through the fragmentation and violence of colonization, and are rebuilding their polities in diverse ways.<sup>21</sup> Indigenous law is not frozen in the past,<sup>22</sup> nor is it a static set of rules; rather, it is adaptable, deliberative, reasoning and reasonable.<sup>23</sup> Indigenous legal orders identify authoritative decision-makers, contain substantive rights and obligations that can evolve through legitimate procedures and put in place procedural safeguards for the protection of individual and community wellbeing.<sup>24</sup> They assist in finding answers to legal questions, set standards and generate criteria for making sound judgements.<sup>25</sup> They possess the basic tenets of law and reasoning identified by pragmatist scholars<sup>26</sup> such as Postema, Fuller and Hart, the latter referenced by Michaels in his discussion of rules of recognition: primary rules, which identify foundational rules of obligation or duty; and secondary rules, or rules of internal recognition, by which primary rules are recognized as authoritative and through which they can legitimately be changed. Hart argues that secondary rules, in addition to primary rules, are necessary for a legal order to be complete.<sup>27</sup>

Michaels agrees that non-state normative orders may have the factual status of law by way of internal rules of recognition. Yet he argues that, in contexts where multiple normative and legal orders operate, a sequence that first identifies what counts as law, then asks how that system of law interacts with other laws, is insufficient to grasp the reality of legal pluralism. This resonates with scholarship that views legal pluralism as a characteristic of virtually all societies and all law,<sup>28</sup> and is consistent with a trans-systemic approach, described as a shift away from ‘comparing the terms of a closed set of legal orders to the challenge of how to maneuver in a normatively diverse world’.<sup>29</sup> For Michaels, interlegality cannot be an afterthought, as in today’s world no legal order exists in a vacuum. Rather, legal orders mutually constitute each other through *external* recognition – what he calls tertiary rules, which are also necessary to make a legal order complete.<sup>30</sup>

The notion that non-state legal orders require recognition as law by other legal systems, especially by state law, is inherently suspicious in a colonial context.<sup>31</sup> So-called radical legal pluralists such as Griffiths reject the concept of external recognition as a manifestation of legal centrism, the idea that all law is state law and that non-state

<sup>20</sup>See (n 17) 58. See J Borrows, ‘Sources and Scope of Indigenous Legal Traditions’, in *Canada’s Indigenous Constitution* (University of Toronto Press, Toronto, 2010) 23–58.

<sup>21</sup>See (n 5).

<sup>22</sup>See (n 11) 131.

<sup>23</sup>See (n 17) 64–66.

<sup>24</sup>V Napoleon, *The Accessing Justice and Reconciliation Project, Cree Legal Summary* (University of Victoria, Victoria, BC, 2012).

<sup>25</sup>J Borrows, ‘Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education’ (2016) 61(4) *McGill Law Journal* 795, 797.

<sup>26</sup>V Napoleon, JD/JID Joint Degree Program in-class presentation, University of Victoria (September 2018).

<sup>27</sup>HLA Hart, *The Concept of Law* (Oxford University Press, Oxford, 1961).

<sup>28</sup>See (n 16).

<sup>29</sup>*Ibid.*, citing Macdonald and Glover, 848.

<sup>30</sup>See (n 18) 91.

<sup>31</sup>*Ibid.* 99.

law's status as law depends on state recognition.<sup>32</sup> Yet a nuance in Michaels' argument gives pause: Indigenous law is unquestionably, factually law, and its status as such does not depend on recognition by the state or any other legal order, but rather on its own internal recognition. Yet in a legally plural reality in which Indigenous legal orders and the state contend with each other and with overlapping jurisdictions, external recognition may indeed be necessary for the effective, practical interrelation of Indigenous law and state law. Michaels borrows from McCormack's example of the interaction of EU and European member states' law to demonstrate this dynamic. Although the following example of UK law is admittedly outdated post-Brexit,<sup>33</sup> the basic principle applies to interaction with any of the member states:

EU law is law in an objective sense, independent of its recognition. However, it is law for UK law only if, and only because, it is recognised by UK law. Similarly, UK law is law in an objective sense, independent of its recognition. However, it is law for EU law only if, and only because, it is recognised by EU law. At least in their inter-relation, recognition therefore matters.<sup>34</sup>

In such an imagined situation of formal equality of legal systems, how are irresolvable conflicts solved? In the EU example, it is suggested that both EU and national law operate within a 'common legal universe',<sup>35</sup> with international law as the umbrella normative order. Yet this seems to be merely another form of legal centrism. In this conception, Michaels points out, external recognition becomes not a constitutive but an accommodating operation, as the recognition between legal systems is no longer governed from within each system, but by a higher system. To avoid a centralized conception of power, and embrace a relational pluralism in which each legal system determines its interactions with another from its own perspective, requires interface norms<sup>36</sup> or linkage rules.<sup>37</sup>

### *Pragmatism and normativity*

My adoption, via Michaels, of Hart's pragmatist metaphors, such as rules of recognition, requires some explanation. Scholars of legal normativity have advanced compelling critiques of pragmatist or positivist accounts of law as a social phenomenon. Webber discusses how, although valuable, the pragmatist account of law is ultimately unsatisfying

<sup>32</sup>J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1.

<sup>33</sup>While the reasons for Britain's withdrawal from the European Union seem to be related more to trends of populism and anti-immigrant sentiment than to a failure of the principle of mutual recognition *per se*, the fact that withdrawal is possible at all perhaps speaks to the limitations of this example as applied to Indigenous-state relations. While EU law has no claim over states' land, land and the claiming of territory are at the centre of legal pluralism in a colonial context. Further, one has to wonder how 'mutually constitutive' EU and UK law really were if it was possible to end the legal relationship – this sounds more contractual than relational, in the spirit with which Mills speaks. Yet, no doubt EU and UK laws and political communities continue to influence each other in the absence of formal agreement, and their citizenries are deeply intertwined. A more detailed discussion of EU dynamics is beyond the scope of this article, but the example given serves to demonstrate the basic principle.

<sup>34</sup>See (n 18) 101.

<sup>35</sup>*Ibid.*

<sup>36</sup>*Ibid* 103, citing Nico Krisch.

<sup>37</sup>*Ibid.*, citing Detlef von Daniels.

because it focuses on the ‘virtually tautological’<sup>38</sup> fact that law coordinates action in society, while leaving out the normative judgements and criteria that participants in a legal order would themselves use to evaluate their legal traditions. Evoking the examples of a Cree hunter asked why the remains of an animal should be treated with care, or a citizen of Canada asked why there is a prohibition on murder, he points out:

For the vast majority of the principles of any legal order, ‘the coordination of human interaction’ at least underspecifies the considerations that account for the content of law. For a great many norms, the disjunction would be so dramatic [to a participant in that order] that the coordination of human interaction would seem like a complete non-sequitur.<sup>39</sup>

These critiques become more compelling in the context of pluralism among normatively diverse legal orders. Roughan argues that institutional and jurisdictional approaches to plurality – such as external recognition, linkage rules and other solutions focused on functional coordination – are inadequate on their own because they do not address normative questions about legitimate authority, and tend to ‘run aground on their own institutionality’.<sup>40</sup> Law is never merely about coordination, but always ‘involves interpretive judgments that embody significant normative claims’.<sup>41</sup> Its content has to make sense to its participants within their society’s distinctive norms. In a colonial context, a significant concern is that the supposedly neutral pragmatist language of coordination, without more, risks erasing normative difference, not to mention histories of colonial violence and subsuming Indigenous peoples’ distinctive experiences and accounts of their lifeways into colonial ontologies.

Nor does a positivist characterization of law account for the way that legal orders and peoples will necessarily alter each other through their interaction, and the values (and violences) that emerge from these encounters over time as normative languages. This is where the mutually constitutive aspect of external recognition goes beyond a functionalist, rule-based analysis. A relationship is always more than its functional coordination – it is an entity unto itself, with its own character, ethics, histories and possible futures. Mills speaks to the normative possibilities of intersocietal relations in terms of mutual aid, a value-rich approach based in Anishinaabe ontology.<sup>42</sup> Webber speaks of the distinctive ‘grammars’ of different legal orders.<sup>43</sup> Roughan describes recognition as an interpersonal and inter-institutional practice that transmits value and normativity across different authorities.<sup>44</sup> Intersocietal legal scholarship can and does integrate the pragmatist approach and move beyond it to embrace these normative and relational considerations. Ultimately, as Webber concludes, normative and pragmatist concerns are integrally intertwined.<sup>45</sup>

<sup>38</sup>J Webber, ‘The Grammar of Customary Law’ (2009) 54 *McGill Law Journal* 589.

<sup>39</sup>*Ibid* at 591.

<sup>40</sup>N Roughan, ‘Politics and Relative Authorities’ (2018) 16(4) *International Journal of Constitutional Law* 1215.

<sup>41</sup>See (n 37) 592.

<sup>42</sup>See (n 12).

<sup>43</sup>See (n 37).

<sup>44</sup>N Roughan, ‘The Recognition in Authority: Roles, Relations, and Reasons’ (29 October 2020), presentation to the Oxford Jurisprudence Discussion Group.

<sup>45</sup>See (n 37) 593.

By extending the language of primary and secondary rules to a discussion of tertiary rules of external recognition between Canadian and Indigenous law, I intentionally take pragmatist language as a starting place for two reasons. First, with due regard to its limitations and risks, pragmatism is potentially an important beginning for many scholars and legal practitioners when first engaging with Indigenous legal orders. As demonstrated earlier, pragmatist accounts of law help those accustomed to state-based forms understand Indigenous legal orders as legal in nature – that is, they function in the way that Fuller and Postema suggest that law functions, including by accomplishing the work of coordination, and towards the goals sought by law.<sup>46</sup> This counters entrenched, colonial assumptions about the supremacy of state-based law by demonstrating that Indigenous legal orders are different but equally possible and reasoned methods of social ordering. Indeed, the work of Hart, Fuller and Postema formed a pedagogical starting place for the first cohort of the JD/JID Joint Degree Program, arguably becoming part of an anti-colonial intellectual framework from which to begin engaging substantively with the diverse normativity of Indigenous legal orders. If students cannot see past their own biases about what law looks like, conversations about normative difference run the risk of taking place within unquestioned colonial frameworks of legal centrism and multiculturalism, rather than legal pluralism.

The second and related reason why this article starts with pragmatist language is that external recognition, and corresponding linkage rules, assist in imagining the interaction between and among *externally differentiated* legal orders. As I will discuss in the next section, the idea of external recognition between Indigenous laws and Canadian law challenges the liberal state as the ultimate normative order and distinguishes itself from colonial recognition. Perhaps the language of coordination acts to assert a boundary that has consistently been violated by Canadian law's imposition on Indigenous lands and peoples: external recognition insists on the continued existence of distinct legal worlds. In this sense, pragmatism starts to appear decidedly normative when extended to a metaphor of tertiary rules between Canadian and Indigenous laws. For both these reasons, a pragmatist approach may be a necessary, if not sufficient, ingredient in engaging with relational legal pluralism in a colonial context.

Before discussing tertiary rules and external recognition further, it is useful to review what I mean by legal pluralism and its status within the colonial state.

### III. Weak and strong legal pluralism

Michaels summarizes two types of legal pluralism identified by theorists, particularly Griffiths: weak legal pluralism, which he argues is compatible with the liberal state; and strong legal pluralism, which he argues is not compatible.<sup>47</sup> Weak legal pluralism is, in fact, societal pluralism under unitary law. The liberal state is grounded upon societal pluralism, including pluralism of the media, thought, political parties, religions and other associations, as elements of a democratic society. Yet societal pluralism is not legal pluralism, but legal centrism. Even groups that are recognized as having some level of autonomy under societal pluralism do not, from the liberal state's perspective, have law-

<sup>46</sup>Ibid 584.

<sup>47</sup>R Michaels, 'On Liberalism and Legal Pluralism' in M Maduro, K Tuori and S Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, Cambridge, 2014) 122.



making power independent of it. Such power would threaten the very foundations of liberalism, which guarantees one rule of law under which all abide, with the state as the guarantor of basic rights and freedoms.

Groups, and not just individuals, can be rights-bearers within the liberal view. The inherent and treaty rights of Aboriginal peoples are protected by section 35(1) of the Canadian constitution, and although the jurisprudence has been clear that these rights arise not from the constitution itself but from Indigenous peoples' prior occupation of the land in organized societies,<sup>48</sup> in practice Canada still treats them as rights distributed within the framework of the liberal state, subject to the normative superiority of Canadian law. In contrast, strong legal pluralism is what is meant by legal pluralism in this article – what Napoleon refers to as decolonized legal pluralism.<sup>49</sup> In strong legal pluralism, state law is not hierarchically superior to non-state law, and instead is just one of many legitimate legal orders. It follows that in a strong legal pluralism, non-state legal orders are peremptory, not open to challenge or appeal to state law (unless this is mutually agreed) because they operate externally to the state rather than under its umbrella.

I argue that the Canadian state remains invested in a form of weak legal pluralism that treats its own law as normatively superior to Indigenous law, despite superficial recognition of Indigenous legal orders as a form of societal pluralism. This critique of recognition is by no means original, but is grounded in the foundational work of scholars such as Glen Coulthard and Audra Simpson. As Coulthard demonstrates in *Red Skin, White Masks*, the last four decades have witnessed the emergence of 'recognition as the dominant framework for self-determination and Aboriginal rights within the Canadian state framework'.<sup>50</sup> Far from accomplishing reciprocity or mutual recognition among peoples, however, Coulthard argues that 'the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend'.<sup>51</sup> Simpson critiques this kind of recognition as the 'gift' of the multicultural state,<sup>52</sup> which accords a protected space of legal recognition only to groups that evidence difference in acceptable terms and therefore requires their contortion. Recognition in this sense is a continuation of colonialism<sup>53</sup> rather than the kind of tertiary rule of external recognition that Michaels asserts is necessary for genuine legal pluralism.

External recognition is an element of law enabling legal orders that spring from different normative worlds to effectively interact without one denying the other's uniqueness. Beyond state-based liberalism or market-based neoliberalism, strong legal pluralism calls for a 'relational ontology'<sup>54</sup> in which legal orders can coexist without domination. Such a relational ontology of external recognition, and not colonial recognition, must be the foundation for linkage rules that enable normative worlds to communicate.

<sup>48</sup> *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313, para 383.

<sup>49</sup> See (n 15).

<sup>50</sup> GS Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, Minneapolis, MN, 2014).

<sup>51</sup> *Ibid* 3.

<sup>52</sup> See (n 1) 12.

<sup>53</sup> See (n 18) 134.

<sup>54</sup> K Hutchings, 'Decolonizing Global Ethics: Thinking with the Pluriverse' (2019) 33(2) *Ethics and International Affairs* 115, 116.

### *Liberal strategies of accommodation*

It is not consistent with modern liberalism for the state to outright deny the existence of Indigenous legal orders. Within its liberal paradigm, Canada finds ways to accommodate Indigenous law and self-governance within unitary state law. In accommodating Indigenous law without fundamentally disrupting its own normative authority, it creates and administers weak legal pluralism. Michaels emphasizes three main strategies used by state law to accommodate non-state law by translating or transposing it into ‘the semantics of its own system’: incorporation, deference and delegation.<sup>55</sup> Incorporation copies non-state norms into state-based norms – for example, by codifying them. Deference transforms non-state laws into facts. Delegation treats non-state law as subordinated law by allowing a space for the development of autonomous norms that achieve their validity, from the state’s perspective, only because and insofar as the state recognizes them. Therein lies the problem of colonial recognition articulated by Coulthard, Simpson and others.

Each of these strategies of accommodation is evident in the Canadian state’s treatment of Indigenous law. The state demands that Indigenous legal orders be ‘cognizable’ to state law,<sup>56</sup> requiring the translation of Indigenous lifeways into legislative and codified forms, a contortion consistent with multicultural recognition. Legislation both incorporates Indigenous legal norms to give them effect and purports to delegate authority and jurisdiction.<sup>57</sup> This legislation is occasionally passed after consultation with Indigenous peoples, a deference that treats their contributions as data that informs ‘the’ law. The duty to consult and accommodate includes a duty to consult on Indigenous governance systems and laws, yet these laws are also treated as factual in nature and are accommodated by incorporating them into the Crown’s regulatory requirements for proponents.<sup>58</sup> In general, Canadian courts treat Indigenous perspectives as evidence, rather than as a source of law.<sup>59</sup> The BC Supreme Court, in the recent *Coastal GasLink* decision, stated that Indigenous law can only be incorporated into domestic law by operation of treaty, court declarations or statutory provisions.<sup>60</sup> Self-government agreements between Indigenous Nations and the state empower space for Indigenous jurisdiction, but such agreements are made legal through legislation – the source of legal authority for Indigenous self-governance in these cases, from the state’s perspective, is not Indigenous legal orders but the enactment of legislation.<sup>61</sup> Legislative schemes such as the *First Nations Land Management Act*,<sup>62</sup> while offering an opportunity for Nations to get out from under the colonial *Indian Act* and regain a greater degree of decision-making control, are restricted to reserve lands and purport to delegate legal authority. In the words of Dimdiigibuu, a House Chief of the Gitksan Nation, the FNLMA creates an interest in the land that does not need to exist<sup>63</sup> because Indigenous peoples already have established

<sup>55</sup>See (n 18) 131. See V Napoleon, (n 15) 7–9 for an analysis of Swensen’s strategies of legal pluralism between state and non-state law.

<sup>56</sup>*R v Van der Peet* [1996] 2 SCR 507 (SCC), paras 550–51.

<sup>57</sup>See, for example, *An Act Respecting First Nations, Inuit, and Metis Children, Youth and Families*, SC 2019, c 24.

<sup>58</sup>*Tsleil-Waututh Nation v Canada* (Attorney General) 2018 FCA 153 (CanLII), [2019] 2 FCR 3, para 567.

<sup>59</sup>*Coastal GasLink Pipeline Ltd v Huson* 2019 BCSC 2264 (CanLII) para 146.

<sup>60</sup>*Ibid* para 127.

<sup>61</sup>See, for example, *Sechelt Indian Band Self-Government Act* SC 1986, c 27.

<sup>62</sup>*First Nations Land Management Act* C 1999, c 24 (FNLMA).

<sup>63</sup>Dimdiigibuu Ardyth Wilson, JD/JID Joint Degree Program in-class presentation (University of Victoria, 2019).

legal – and jurisdictional – interests in their lands by virtue of their own laws and constitutions.

### Case study: Indigenous Utilities Regulation Inquiry

To see the concerns of the state in maintaining weak legal pluralism while upholding legal centrism, and using the strategies of incorporation, deference, and delegation to do so, the BC Utilities Commission (BCUC)'s recent Indigenous Utilities Inquiry<sup>64</sup> provides a fascinating example. This Inquiry was launched in 2019 in response to a growing number of Indigenous-owned or governed electrical utilities applying to be exempted from being considered a 'public utility' under the *Utilities Commission Act*.<sup>65</sup> Exemption would mean that the Indigenous utility would not have to meet the restrictive rate application criteria applied by the BCUC to the main public utility in the province, BC Hydro. The need for a regulator is clear when one considers the nature of electrical utilities: they are almost always natural monopolies given the infrastructure required to distribute electricity, and consumers of electricity within their service areas do not have market choice that would theoretically maintain rates at a reasonable level. The regulator's job is to protect consumers by keeping rates low while ensuring that the public utility can make 'a fair return on its investment'.<sup>66</sup> BC Hydro enjoys a monopoly and an economy of scale that allows it to comply with the regulation while making a profit. However, small-scale Indigenous utilities trying to produce or distribute electricity do not enjoy the advantages of a public utility like BC Hydro, having been excluded from the energy market while BC Hydro enjoyed a largely unregulated infrastructure build-out on their territories. The BCUC's criteria for assessing rate applications does not take into account socio-economic, financial, governance and other factors of importance for First Nations. The Inquiry's task, then, was to determine how, or whether, Indigenous utilities should be regulated by the province.

Although the Inquiry took place relatively quietly, it was an extraordinary process that saw a provincial regulator and First Nations intervenors genuinely grappling with issues of legal pluralism. It explored issues of territory and overlapping jurisdiction as well as the potential relationship between Indigenous dispute-resolution processes and the state in safeguarding citizen-consumers' rights, which was the Commissioners' primary concern. The process was touted as the first act by a provincial regulator in accordance with BC's UNDRIP legislation through implementing self-determination and economic reconciliation. However, in the Final Report that BCUC released in April 2020,<sup>67</sup> it is clear that its recommendations remain limited to weak, rather than strong, legal pluralism. The report's primary recommendation was that a First Nation should determine the means of regulation of an Indigenous utility providing services on that First Nations' reserve land.<sup>68</sup> This stays safely within the colonial structures of the *Indian Act* and is consistent with a delegated law approach. The Commissioners shied away from addressing the

<sup>64</sup>BC Utilities Commission, Indigenous Utilities Regulation Inquiry (2019), <<https://www.bcuc.com/ApplicationView.aspx?ApplicationId=669>>.

<sup>65</sup>*Utilities Commission Act* RSBC 1996, c 473, s 1(1) ('UCA').

<sup>66</sup>British Columbia Utilities Commission, 'What is Energy Utility Regulation?' (2019), <[https://www.bcuc.com/Documents/Proceedings/2019/DOC\\_53998\\_BCUC-Infosheet-Regulation-2019-05-13-WEB.pdf](https://www.bcuc.com/Documents/Proceedings/2019/DOC_53998_BCUC-Infosheet-Regulation-2019-05-13-WEB.pdf)>.

<sup>67</sup>BC Utilities Commission, *Indigenous Utilities Regulation Inquiry Final Report* (30 April 2020), <<https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/470256/1/document.do>>.

<sup>68</sup>*Ibid* 42.

complex work of a territorial approach to self-regulation, which would contend with the reality of Indigenous procedures and governance decisions applying to non-Indigenous people off-reserve and would in effect acknowledge Indigenous governing authority that does not have its source in the *Indian Act*, but in the Nations' own laws.

The other primary recommendation was that self-regulation, even within reserve boundaries, would depend on the Indigenous Nation demonstrating that it had an appropriate complaint and dispute-handling process to protect ratepayers.<sup>69</sup> If the protections are not deemed adequate, the BCUC would retain jurisdiction to handle complaints. BCUC would also be available as an appeals body to any ratepayer who was dissatisfied with the First Nations' dispute-resolution process, which it does not do in the case of municipalities, which are exempted from regulation under the UCA.<sup>70</sup> This is clearly a component of weak legal pluralism, where two legal systems are not genuinely external to each other, but rather ordered hierarchically, with the state as the normatively superior order. It is a kind of incorporation or delegation, where the state embraces a non-state process only insofar as it is consistent with state values and does not challenge the state's ultimate authority. The role for distinctive dispute-resolution forums and substantive laws in alignment with distinct Indigenous legal orders is restricted to dispute forums that are state-like. Here we see a state body grappling with the ideological conflict between Indigenous self-determination and the state as the guarantor of rights.

It is unclear whether the Commissioners do not believe that Indigenous law is truly law, whether they believe it is law but think it is inferior or ill-equipped to protect individual rights or whether they believe Indigenous law is capable of providing robust individual protections but are unwilling or unable to recommend transformative change because they feel they would be overstepping the BCUC's legal mandate by doing so (which in fact they stated in the Final Report).<sup>71</sup> Their intent was clear to empower a form of administrative self-determination on a limited land base within the state's normative framework, but fundamentally they were unable to consider a genuinely external legal order.

### *Neoliberalism and legal pluralism*

There is another reason why the BCUC example is relevant to Michaels' discussion of legal pluralism. He concludes that state liberalism is incompatible with strong legal pluralism because the state will decline to recognize non-state law that is either too weak to present an alternative, or too strong, presenting a genuine threat to the state's authority.<sup>72</sup> Only non-state law that is 'just right' in terms of its power will be granted 'recognition' within the liberal state. However, he questions whether neoliberalism might be compatible with strong legal pluralism, because neoliberalism itself transcends the state as the ultimate regulator and guarantor of freedom. The neoliberal view sees maximum freedom flowing from subjecting the state itself to the forces of the market, and this freedom is primarily economic rather than political. From this perspective, the

<sup>69</sup>Ibid 44.

<sup>70</sup>Ibid 45.

<sup>71</sup>Ibid 15.

<sup>72</sup>See (n 46) 132.

state is merely one of many legitimate normative orders, and not necessarily superior to those of private institutions, groups or corporations.<sup>73</sup>

One can certainly see how the interests of First Nations, in having the freedom to develop in the relatively autonomous space of the market and set their own regulations according to their own laws and priorities, could be better supported by a neoliberal framework. Entering into contractual relationships with corporations that offer economic opportunities, and that create a space to embed Indigenous laws and standards, may be preferable than trying to demand justice from the state under a social contract that was first imposed and has since failed Indigenous peoples so epically. Even the state may find it more palatable to consider Indigenous law as a kind of private contract law rather than an alternative public law that has its own constitutional framework(s). The BCUC Final Report is consistent with this idea. It suggests that individuals within the service provision area of the Indigenous utility who are not members of the First Nation would have to be consulted and agree to the Indigenous utilities' rates and to be subject to the governing body's dispute-resolution forum – in short, they would have to contract in to be governed by a different set of private rules and norms.<sup>74</sup>

Yet there are dangers for legal pluralism and Indigenous legal orders in embracing a neoliberal, privatized framework. Smaller, local and community-based legal orders may be overwhelmed by the dominance of the market, as capitalism tends to atomize communities and reduce their members to market participants.<sup>75</sup> Neoliberal private property frameworks may undermine kinship-based legal obligations, eroding Indigenous law rather than creating space for it to grow.<sup>76</sup> The problem is that neoliberalism is still based on a paradigm of domination of one normative order over all others – a colonial paradigm – substituting transnational market and capitalist domination for state domination. Whether Indigenous law is managed by the state or channelled by market forces, neither results in decolonized legal pluralism. Michaels reaches a similar conclusion: neither liberalism nor neoliberalism is compatible with strong legal pluralism.<sup>77</sup>

Indigenous legal orders spring from distinctive normative orders that are external to both state-based liberal norms and market-based neoliberal norms. Yet these legal orders exist in a shared effective reality of interaction with these other legal and normative worlds, not to mention with each other's normative worlds, which also differ significantly. This interaction is subject to an extreme imbalance of power that needs to be corrected to allow for mutual external recognition – necessarily an element of law, Michaels argues, in a legally plural world. As we have seen, neither liberal nor neoliberal ideologies are up to the task of correcting the balance of power. It seems logical that solutions to a colonial problem cannot come from within a colonial paradigm. Indigenous ontologies must provide the framework within which Indigenous law exists autonomously, yet in relationship with the state and other legal orders.

<sup>73</sup>Ibid 137.

<sup>74</sup>See (n 66) 32.

<sup>75</sup>See (n 46) 140.

<sup>76</sup>B Egan and J Place, 'Minding the Gaps: Property, Geography, and Indigenous Peoples in Canada' (2013) 44 *Geoforum* 129; see V Napoleon and E Snyder, 'Housing on Reserve: Developing a Critical Indigenous Feminist Property Theory' in A Cameron, S Graben and V Napoleon (eds), *Creating Indigenous Property: Power, Rights and Relationships* (University of Toronto Press, Toronto, 2020).

<sup>77</sup>See (n 46) 140–42.

#### IV. Mutually constituting political community

Mills identifies the problem as one of relationships based on contract. For him, contract is an inherently violent way of relating because contractual relationships have a beginning and an end, at which point, presumably, the parties can walk away from each other. This stands in contrast to Anishinaabe conceptions of constitutionalism and relationality.<sup>78</sup> An alternative to contract as the basis of our shared life is treaty, understood as ‘the intentional deepening of the intersocietal political community that always-already exists’ on Turtle Island.<sup>79</sup> This view affirms both the uniqueness of Indigenous and non-Indigenous normative worlds as well as the interdependence between them. An Anishinaabe ontology would have us constitute ourselves as a shared political community on the basis of networks of mutual aid, in which we form direct relationships and rely on each other’s unique gifts. In communicating Anishinaabe constitutionalism, Mills invokes Elder Gary Potts’ metaphor of two saplings, a birch and a black spruce, growing out of a decomposing old white pine, ‘and none was offended in the least by the presence of the others because their identities were intact’.<sup>80</sup> In this rooted and mutually constituting view, the saplings necessarily exist in relationship to one another and to what has come before without one overpowering the other. Rather than a living tree within which all difference must struggle for its right to expression, Mills envisions our constitutional order as a treaty confederacy – a forest instead of a single tree.

Using the language of treaty rights, Mills argues that Canada understands treaties as a second-order constitutional matter of distributive justice that attempts to account for difference within the single social contract.<sup>81</sup> Michaels would argue that this is all the liberal state is capable of doing from its internal perspective. Conversely, Mills is describing a legal and constitutional pluralism of externally differentiated worlds. In such a plural reality, treaties – and, more broadly, our relationships as peoples – have first-order constitutional significance because they form the ‘total relational means’ by which normative orders orient to each other.<sup>82</sup> This renewed relational understanding, for him, is the only way to overcome the fundamental power imbalance of settler supremacy and weak legal pluralism:

We don’t escape settler supremacy if all we’re prepared to do is tolerate Indigenous legal traditions as a sort of quirky addition to Canada’s otherwise uninterrupted constitutional order. We have to transform that very structure to allow Indigenous legal traditions to stand within their own constitutional worlds, not contain and re-express them post-fact within the existing terms of the settler contract.<sup>83</sup>

This treaty vision is legal in nature but also extra-legal, as it transcends any one constitutional order to imagine their relational coordination.

Mills’ mutually constituting political community sounds much like Michaels’ mutually constitutive external recognition. Further, Mills’ observation that our political communities are ‘always-already’ in relationship and fundamentally interdependent resonates with Michaels’ assertion that interlegality cannot be an afterthought, but in

<sup>78</sup>See (n 12) 210.

<sup>79</sup>Ibid 211.

<sup>80</sup>Ibid 231.

<sup>81</sup>Ibid 220.

<sup>82</sup>Ibid 242.

<sup>83</sup>Ibid 229.

fact co-arises as part of the very nature of law(s) itself. Our distinct normative worlds are not unshaped by each other – in fact, even when these worlds are in disagreement, they rely on each other for their effectiveness in a shared reality.

If our legal systems are always-already in relationship, if they could not even *be* without being-in-relation, why the need for external recognition? Mills clarifies that while our societies were already interrelated, the creation of treaty was an intentional act that deepened political community. Perhaps, then, it is treaty itself that formed the external recognition by which British and Anishnaabe legal systems were originally mutually constituted. Does this suggest that the creation of treaty constituted Anishnaabe law? Not at all. It is important not to forget that Anishnaabe law was here long before, constituted in this place through its creation epics and foundational agreements with other human and non-human orders. It does mean that, in Michaels' formulation, the fact that Anishnaabe law has tertiary rules capable of recognizing and interacting with other systems of law is part of what makes it a system of law in the first place.

### Case study: 'Fictive kin' as a linkage norm

Michaels discusses the need for external recognition to have 'interface norms' or 'linkage rules' that allow legal worlds to interact effectively. I prefer to hybridize these terms as 'linkage norms'. 'Linkage' connotes an essence of the early treaties of mutual aid of which Mills reminds us, while 'norms' communicates ways of orienting to each other rather than sets of rules. What kinds of linkage norms could enable effective communication between state and non-state legal worlds?

A 2018 case at the Ontario Superior Court of Justice discusses what I suggest may be linkage norms with which the Anishnaabe recognized the British as having legal personality and invited the British into their already rich diplomatic and legally plural reality.<sup>84</sup> In *Restoule*, the Court convened in Anishnaabe communities for weeks, immersed itself in Anishnaabe legal and cultural procedures, and called experts in order to consider the intersocietal nature of the Robinson Treaties of 1850. Finding that the treaties continued a relationship with the British begun with the Covenant Chain Alliance and the Treaty of Niagara of 1764, it explored in detail the concept of 'fictive kin' that allowed the Anishnaabe to treat with the British.<sup>85</sup> In the kinship-based Anishnaabe legal order, one cannot form relations of any kind with non-kin. If no kin relationship exists, a fictive kin relationship must be created to initiate a relationship and create agreements or obligations between the parties. According to expert witnesses, 'only by becoming relatives through long-established Indigenous protocols could Europeans make alliances on which they depended for both trade and security'.<sup>86</sup> The British adopted kinship metaphors in communicating with the Anishnaabe, indicating that they understood the moral and legal obligations and duties that kin owed to each other. Importantly, at that time 'the Crown had its own principles of obligation to the Anishnaabe based in Euro-Canadian legal traditions'.<sup>87</sup> Each legal

<sup>84</sup> *Restoule v Canada (Attorney General)* 2018 ONSC 7701, aff'd in part 2021 ONCA 779 (*Restoule*). A majority of the Court of Appeal for Ontario upheld the trial judge's interpretation of the treaties in their historical context.

<sup>85</sup> *Ibid* paras 43–47.

<sup>86</sup> *Ibid* para 44.

<sup>87</sup> *Ibid* para 46.

tradition had its own tertiary rules for recognizing the other's law and determining how it could engage the other.

If fictive kinship is an example of a linkage norm from within Anishinaabe law, perhaps the treaty itself is not the embodiment of linkage norms, but the shared intersocietal agreement only possible with the enactment of linkage norms within each legal order. Put another way, it is the tertiary rules of external recognition within each legal order that make the treaty – the relationship – itself legal. Anishinaabe law was, and is, robust enough to respond to another legal system – even adapt to it – without losing its own distinct character. It is not entirely clear that Canadian state law today has this same capacity.

In the case of historical agreements like the Robinson Huron Treaties, the liberal state has purported to convert these agreements into matters of distributive justice and treat 'the Aboriginal perspective' as fact instead of law, a form of deference. In British Columbia, it is widely known that few treaties were concluded and Indigenous territories remain unceded: never gifted, sold or surrendered, so that the extension of colonial law over Indigenous lands and people is based on the one-sided legal fiction of assertion of sovereignty. BC's modern treaty process has been deeply criticized,<sup>88</sup> with preconditions dictated by the state, which Mills might argue is not treaty at all but a species of contract subject to state dominance.<sup>89</sup> Another way of summarizing this situation is that while state law has asserted itself through a bare exercise of power, and while Indigenous legal orders have never gone away or stopped asserting their existence, neither has recognized the other in a way that would create the mutually constitutive situation described by both Mills and Michaels.

This is not due to lack of effort on the part of Indigenous peoples. Nations have long sought legitimate and reciprocal legal relations with Canada, and continue to articulate linkage norms from within their legal orders.<sup>90</sup> While Indigenous peoples try to teach the state about these ways of mutual learning and recognition, the state continues to use the only law it seems to be capable of recognizing – its own – to relate to Indigenous legal orders. The state's seeming incapacity in this regard begs the question: If state law does not have tertiary rules for the recognition of legal systems different from its own, according to Michaels, is it incomplete as law?

### *Reciprocal recognition*

It is important to acknowledge that external recognition as an element of law is mutual – that is, reciprocal. It is not exclusively about state law recognizing non-state law, as this one-sidedness creates the type of artificial 'recognition' critiqued by Coulthard and Simpson, a recognition that is code for continued colonization and weak legal pluralism. External recognition is a necessary aspect of strong legal pluralism and is just as much about an Indigenous legal order's recognition of state law and of other Indigenous legal orders as it is about state recognition of Indigenous law.

<sup>88</sup>T Alfred, 'Deconstructing the British Columbia treaty process' (2001) 3 *Balayi: Culture, Law and Colonialism* 37.

<sup>89</sup>See (n 12) 222.

<sup>90</sup>See, for example, the recent G2G Letter of Commitment between Secwepemc Nation and BC, based on the Secwepemc Porcupine Story, which details the process of mutual learning and agreement between nations, <[https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/secwepemc\\_g2g\\_loc\\_with\\_iaa\\_\\_signed.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/secwepemc_g2g_loc_with_iaa__signed.pdf)>.



Michaels summarizes that a complete legal order requires primary rules for its content, secondary rules for its operation and tertiary rules to establish its relation with other legal orders through linkage norms.<sup>91</sup> Applying this analysis to Indigenous legal orders treats them on a more equitable conceptual footing as law. It challenges us to move out of a colonial frame of reference where interlegality is denied, with the result that the status quo is unchanged and Indigenous legal orders remain subordinate to the state, into a frame of reference where Indigenous legal orders determine their interactions with state law and with other Indigenous orders and are more fully constituted in the process. The process of non-state legal orders ‘offering themselves for recognition’,<sup>92</sup> as Michaels suggests, is impractical from the perspective of power. The process must be an active one, a claiming of power and legality through the enactment of distinctly Indigenous tertiary rules.

In the BC context, the provincial government has made a commitment to shared decision-making and co-governed processes of reform of provincial laws.<sup>93</sup> Michaels is clear that shared authority is not the same as external recognition. Negotiations between legal orders regarding which sections of the legal realm each will inhabit are possible, but external recognition describes ‘the prior situation that different legal orders recognize each other as laws, so as to make shared authority possible’.<sup>94</sup> The new BC UNDRIP legislation contains a provision that aims to operationalize consent by creating mechanisms for the exercise of a statutory power of decision jointly by an Indigenous governing body and the provincial government.<sup>95</sup> While this theoretically allows Indigenous Nations to take up more jurisdictional space within the province’s statutory regime, it is still based on the state’s assumption of a singular source of legal authority. For these arrangements to be lawful or legitimate within Indigenous legal orders requires reciprocal legal processes within those orders themselves.

In a situation of external recognition, legislation might be part of the state’s tertiary rules: means by which the state recognizes enactments or expressions of Indigenous law as legal from within its own internal perspective. Simultaneously but separately, tertiary rules in the form of procedures within Indigenous legal orders would recognize the state’s legislation as legal from within *its* own internal perspective. Thus, the legal worlds would be mutually constitutive – the legislation would have legitimacy for the state according to internal recognition, and it would have legitimacy for Indigenous law according to external recognition *by* Indigenous law. Equally, the Indigenous law-making processes, legislative or otherwise, would have legitimacy for the Nation according to internal recognition, and would have legitimacy for the state according to external recognition by the state. This would, perhaps, be the beginning of a reciprocity that signals justice.

An example of a situation demonstrating the beginnings of, or at least possibility for, reciprocal recognition is the *Haida Gwaii Reconciliation Act*.<sup>96</sup> The Act provides a statutory framework for the Kunst’aa guu – Kunst’aayah Reconciliation Protocol, intended to guide joint decision-making between the Haida Nation and BC regarding

<sup>91</sup>See (n 18) 108.

<sup>92</sup>Ibid 109.

<sup>93</sup>Province of British Columbia and First Nations Leadership Council, Joint Agenda: Implementing the Commitment Document – Shared Vision, Guiding Principles, Goals and Objectives (2018), <[https://news.gov.bc.ca/files/BC\\_FNLN\\_Vision.pdf](https://news.gov.bc.ca/files/BC_FNLN_Vision.pdf)>.

<sup>94</sup>See (n 18) 110.

<sup>95</sup>See (n 8) s 7(1)(a).

<sup>96</sup>*Haida Gwaii Reconciliation Act* SBC 2010, c 17.

land and natural resource management on the islands of Haida Gwaii.<sup>97</sup> The preamble of the Act states that while the parties to the Protocol 'hold differing views with regard to sovereignty, title, ownership and jurisdiction' over Haida Gwaii,<sup>98</sup> for the purposes of working together to implement the Protocol, 'British Columbia will introduce legislation to provide the statutory framework, and the Haida Nation will provide its necessary legal authority'.<sup>99</sup> This sequence could provide for mutual recognition of legal authorities as a first relational step, which, according to Michaels, makes possible the implementation of joint decision-making, shared authority, coordination of jurisdictions or other operational arrangements.

### *Jurisdictional considerations*

What are the legal and jurisdictional arrangements that will meet human rights standards, redress historic and contemporary genocide, restore stolen land and create right relations between Indigenous and non-Indigenous peoples in so-called Canada? One possible answer is: arrangements that comply with each distinct Indigenous legal order, as that legal order is expressed today by the Indigenous people concerned. Practical questions regarding the coordination of jurisdictions naturally arise when contemplating plural legal authorities, many of which were expressed during the BCUC Indigenous Utilities Inquiry: What are the boundaries between jurisdictions? Who is subject to what jurisdiction, if jurisdictions overlap? How is it possible to guarantee the rights and freedoms of individuals who may be subject to an Indigenous legal or regulatory process but have no vote within that Nation's governance structure? How can the rights and freedoms of individuals who may wish to appeal to the state for relief from actions of their Nation's government be guaranteed? No doubt these are vital questions, which must be approached in ways that account for the diversity and distinctiveness of Indigenous peoples and legal orders. This diversity means that there is no one-size-fits-all solution and no single legal framework that can be placed over top of these complex relationships in a search for legal and jurisdictional certainty – this would be centrism instead of pluralism. Michaels argues that external recognition leads us to a relational concept of law, where the nature of law is no longer determined in an absolute fashion but only relative to other legal orders,<sup>100</sup> and where each legal order must determine its own interactions with others. If Indigenous and non-Indigenous laws and political communities are in fact mutually constitutive, this means that jurisdictional solutions must be emergent from each of these unique diplomatic and legal relationships.

This is not to say that no action can be taken – quite the opposite. All too often, state hand-wringing over legal certainty becomes the obstacle and the excuse for failing to take meaningful action towards mutual recognition with Indigenous authorities. Legal certainty must give way a little in an environment of legal pluralism, to allow a space of not-knowing that is vital for a truly consensual and diplomatic process; if the outcome is predetermined, it is not legal pluralism or self-determination but a continuation of

<sup>97</sup>Ibid, preamble.

<sup>98</sup>Ibid. For a more detailed discussion of the implications of this agreement to disagree on sovereignty, see J Webber, 'We are Still in the Age of Encounter: Section 35 and a Canada Beyond Sovereignty', in P Macklem and D Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, Toronto, 2016) 75.

<sup>99</sup>Ibid, Preamble.

<sup>100</sup>See (n 18) 110.

colonialism. In the BCUC example, the Commissioners could have made a recommendation that, for example, Indigenous Nations should determine the means of regulation of an Indigenous utility providing services on that First Nations' title territory, including the lands and territories that they have traditionally owned, occupied or otherwise used or acquired, to draw on the language of both section 35 and UNDRIP. This would have been an UNDRIP-compliant recommendation, and an excellent starting place to begin a negotiation between the Crown, Crown corporations and First Nations that might have led to negotiated jurisdictional solutions. It also may have compelled a conversation about how citizens of different yet mutually constituting nations sharing territory participate meaningfully and democratically in each other's governance processes when they are affected by them – according to the standards of all legal orders involved.

Far-reaching jurisdictional arrangements for Indigenous self-government in Canada have been proposed before. The Report of the 1996 Royal Commission on Aboriginal Peoples recommended a sphere of inherent Aboriginal jurisdiction under section 35 that would comprise all matters relating to the good government and welfare of Aboriginal peoples and their territories<sup>101</sup> – and the Commissioners were clear that these territories are not limited to reserve lands. The core of this sphere would include all matters of vital concern to the life and welfare of a particular Aboriginal people that do not have a major impact on adjacent jurisdictions, including the power to draw up a constitution, set up basic governmental institutions, establish courts, lay down citizenship criteria and procedures, run its own schools, maintain its own health and social services, deal with family matters, regulate many economic activities, foster and protect its language, culture and identity, regulate the use of its lands, waters and resources, levy taxes, deal with aspects of criminal law and procedure, and generally maintain peace and security within the territory.<sup>102</sup> With respect to these matters, Aboriginal governments would have the right to exercise authority without the need for federal and provincial agreements, and conflicting federal and provincial laws would automatically be displaced. According to the Commissioners, an Aboriginal government 'can thus expand, contract or vary its exclusive range of operations in an organic matter, in keeping with needs and circumstances'.<sup>103</sup>

However, this model was never implemented. Instead, as described, Canada has persisted with a programme of administering weak legal pluralism by accommodating limited self-government powers on a small land base within unitary state authority. Indigenous peoples exercising their self-determination have successfully rebuilt governance and negotiated agreements that push this envelope, especially since the 2014 *Tsilhqot'in* title win has motivated governments to come to the table. Increasingly, Indigenous peoples require these agreements to contain frameworks for a relationship going forward that will be based on principles of mutual recognition and that include milestones for land restitution and self-governance, rather than setting out an entire jurisdictional framework at the outset as a full and final agreement. In this way, Indigenous peoples are working to make the assimilative, transactional and contractual relationship with the Crown a more relational, diplomatic, and nation-to-nation one,

<sup>101</sup>RCAP, 'Volume 2: Restructuring the Relationship', *Report of the Royal Commission on Aboriginal Peoples* (1996), <<https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>>.

<sup>102</sup>Ibid 207.

<sup>103</sup>Ibid 212.

founded as much on their legal principles, processes and values as on those of Canadian law.

Fundamentally, jurisdictional coordination among state and Indigenous legal orders must account for normative difference to avoid becoming yet another form of one-sided recognition by which the state requires the contortion of Indigenous law and governance into colonial forms. This may necessitate challenging notions of jurisdiction itself. Jurisdiction as it is practised in Western liberal democracies evokes unitary authority and is founded in positive law: the very word denotes the power of a legal authority to ‘say what the law is’. Canada imposed this model of jurisdiction on Indigenous peoples with the *Indian Act*, fragmenting Indigenous relational governance, and Indigenous peoples have adapted by reclaiming self-governance both within and outside of this framework. Yet discursive, decentralized and kinship-based authority manifests jurisdiction differently than legislative authority. Plural authorities within a broader Indigenous legal order are internally discursive, in the sense that they emerge through constant dialogue, accountability and affirmation involving many different voices – what Napoleon terms ‘intense democracy’<sup>104</sup> in the case of Gitksan law and Boisselle refers to as a ‘polyphonic’<sup>105</sup> legal order in the case of Coast Salish law. Diffuse and decentralized authorities have no jurisdictional monolith, no Leviathan and no magic pen to draw lines on a map separating one authority from another, having instead more relational and complex ways of determining boundaries and authority. In a legally plural, multi-juridical environment such as Canada, authority itself may well be constituted through linkage norms that transmit value and normativity across authorities<sup>106</sup> so as to make reciprocal legal relations possible.

## V. Conclusion

Ours is the gift and struggle of standing side by side, different and together. Ours, to rise to live in right relation.<sup>107</sup>

Here Mills articulates the work of treaty: learning to interact legitimately and lawfully across external difference. As Webber, Napoleon, Fournier and Borrows have stated succinctly, plurality is an inescapable fact of our human predicament and we had better get to work on understanding how to act in a plural world.<sup>108</sup> The demand of relational legal pluralism for Canada’s constitutional order is a federalism, or treaty federalism, that does not seek to subsume, deny or dominate Indigenous normativity. Canada’s status in law within multi-juridical Canada will lack legitimacy unless it can develop the capacity for reciprocal processes of external recognition with Indigenous legal orders. Despite this, the state holds onto the myth of legal centrism through colonial strategies of recognition and accommodation that purport to administer difference and deny Indigenous self-determination. Neither liberal nor neoliberal ideologies are consistent with legal pluralism, and Indigenous ontologies of treaty, relationality and mutual aid are better positioned to form the basis for a unique and just constitutionalism with Canada.

<sup>104</sup>V Napoleon, ‘Gitksan Democracy: On Its Own Terms’ (2020) unpublished draft, forthcoming as a book chapter in a collection edited by Jim Tully et al.

<sup>105</sup>A Boisselle, *Law’s Hidden Canvas: Teasing Out the Threads of Coast Salish Legal Sensibility* (PhD Dissertation, University of Victoria, 2017) 173, 208.

<sup>106</sup>See (n 40).

<sup>107</sup>See (n 12) 209.

<sup>108</sup>See (n 16) 854.

The work that Indigenous peoples are doing to rearticulate their legal orders includes the development and recovery of tertiary rules enabling their recognition and interrelation with each other, with state law and with markets norms. In the course of their own processes of external recognition, Indigenous legal orders mutually constitute effective realities of legal pluralism on Turtle Island as they have always done. Remembering the insight of the Honourable Lance Finch, former chief justice of British Columbia, the work of Canadian law is more about finding its place within the plural landscape of Indigenous legal orders than it is about attempting to make space for Indigenous legal orders within unitary Canadian law.<sup>109</sup>

Such an inquiry brings us to questions of citizenship, and in fact this is at the heart of what Mills suggests will get us out from underneath the liberal settler-imposed contract.<sup>110</sup> He says that instead of framing the crisis of our relationships in terms of legal remedies, we should be situating it within a much larger question of what we want citizenship in Canada to mean.<sup>111</sup> This, he offers, is a constitutional dialogue that has the potential to reorient us to each other and address the violence of Canada's confederation story. I understand it as a shift away from a colonial ontology to a relational legal and ontological pluralism emerging from profound regard for each other's existence as distinct peoples. Treaties or other expressions of external recognition may give this mutual regard form, but Mills reminds us that they are less legal instruments than frameworks for right relationships.<sup>112</sup> If such relationships are established in good faith, jurisdictional and legal solutions will become the tools used to meet the needs and express the gifts of our different communities. But part of what I take from Mills' argument is that we should never confuse the technical terms of the contract with the relationship itself. Before we can hope to meaningfully reconcile sovereignties, we must learn to constitute ourselves as communities of communities,<sup>113</sup> as diverse peoples, and as plural normative and legal orders – and ultimately as citizens who belong to each other as much as to a state.

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<sup>109</sup>The Honourable Chief Justice LSG Finch, 'The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice' (2012) Continuing Legal Education Society of British Columbia Paper 2.1.

<sup>110</sup>See (n 12) 225.

<sup>111</sup>Ibid.

<sup>112</sup>Ibid.

<sup>113</sup>Ibid.